No. 13405

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THERON LEROY ELDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLEE.

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REPLY BRIEF FOR APPELLEE.

I.
Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on April 2, 1952, under Section 462 of Title 50, App., United States Code. [R.[1] pp. 3-4.]

On April 21, 1952, the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on May 14, 1952.

On May 14, 1952, appellant was tried in the United States District Court for the Southern District of California, before a jury, and was found guilty as charged in the Indictment. [R. p. 4.]

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[1]"R." refers to Transcript of Record.

On May 26, 1952, appellant was sentenced to imprisonment for a period of three years, and judgment was so entered. Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

II.
Statutes Involved.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section], . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, . . ."

III.
Statement of the Case.

The Indictment charges as follows:

INDICTMENT.

(U. S. C., Title 50, App., Sec. 462—
Selective Service Act, 1948)

The Grand Jury charges:

Defendant Theron Leroy Elder, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 88, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on February 12, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do. [R. pp. 3-4.]

On April 21, 1952, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Ben Harrison, United States District Judge, and entered a plea of Not Guilty to the offense charged in the Indictment.

On May 14, 1952, the case was called for trial before the Honorable Ben Harrison, United States District Judge, with a jury, and on May 14, 1952, the jury found the appellant guilty as charged in the Indictment. [R. p. 4.]

On May 26, 1952, appellant was sentenced to imprisonment for a period of three years in a penitentiary. [R. pp. 5-6.]

Appellant assigns as error the judgment of conviction on the following grounds:

A—The District Court erred in not concluding that appellant had made a timely written request for a personal appearance hearing before the local board and that he had been denied due process when, instead of a personal appearance hearing, he was given an appeal; the District Court erred in not giving appellant's proposed jury instruction No. 13 on that subject; the District Court erred in refusing to admit evidence on this point and in not submitting the issue to the jury. (App. Spec. of Error 1—App. Br. p. 6.)[2]

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

B—The District Court erred in refusing to admit testimony that the Hearing Officer forwarded, for the consideration of the Department of Justice, and the Appeal Board, an incomplete report of the Hearing conducted by him; further, that he did not inform the appellant, either before or during the Hearing, that he had information from the F. B. I. adverse to the appellant's claim, in fact, he did state to appellant that there were no adverse statements in his case, but that he did have a couple of questions to ask of appellant; that the Hearing Officer subsequently used adverse hearsay information in his Advisory Opinion without having given appellant any opportunity to explain or rebut it; that the Court erred in refusing to submit the issue to the jury and in refusing to give appellant's proposed jury instructions Nos. 10 and 14 on the subject. (App. Spec. of Error 2—App. Br. pp. 6-7.)

C—The District Court erred in not concluding that the appellant's mother had notified the local board in writing of her dependency. The Court further erred in not concluding appellant had been denied due process when the local board failed to send the mother a Classification Notice, thus depriving her of the opportunity to appeal independently of appellant; the Court erred in not submitting the issue to the jury.

IV.

Statement of Facts.

On September 14, 1948, Theron Leroy Elder registered with Local Board No. 88, Pasadena, California. He was eighteen years of age at the time, having been born on January 9, 1930. He gave his occupation as "Student."

On May 6, 1949, Theron Leroy Elder filed with Local Board No. 88, SSS Form 100, Classification Questionnaire, and by letter attached to the questionnaire he informed Local Board No. 88 that he was a conscientious objector and asked for further information and forms.

SSS Form 150, Special Form for Conscientious Objector, was furnished Elder and he completed this form and filed it with Local Board No. 88. Elder claimed to be a conscientious objector because of his religious training and belief. He was classified 1-A-0 on August 29, 1950, and was mailed SSS Form 110, Notice of Classification.

On August 23, 1950, Local Board No. 88 received a request for consideration of certain facts as a possible deferment of Theron Leroy Elder from his mother, Mrs. Juanita Elder. [R. pp. 42-43.] The facts given by Mrs. Elder in her request were:

> "If Roy was home with me he could take me to White Memorial Clinic . . . I do have a daughter—she don't drive the car. Roy could pick up the groceries with the car—also fix the car when it needs it. Would this situation be considered?"

On September 9, 1950, Elder requested "a personal appearance before the appeal board." This request was made upon the ground that he was conscientiously opposed

to both combatant and non-combatant training or service in the armed forces. The local board treated this request as an appeal and forwarded Elder's Selective Service file to the Appeal Board on January 12, 1951.

On January 22, 1951, the Appeal Board reviewed Elder's Selective Service file and determined that he was not entitled to classification in either a class lower than IV-E or in Class IV-E, and forwarded the file to the Department of Justice. A hearing was held by the Department of Justice Hearing Officer on May 22, 1951. The Hearing Officer recommended that Elder should not be given either a 1-A-0 or IV-E classification.

On June 25, 1951, the Appeal Board reclassified Elder 1-A by a vote of 3-0 and he was mailed SSS Form 110, Notice of Classification.

On August 23, 1951, Elder was given a personal appearance before the local board to consider the merits of reopening his case. In this hearing he was required to sign a waiver of rights of reopening his case. Pursuant to such hearing and review of Elder's Selective Service file, the case was determined to be not subject to reopening by the local board. Notice that his case was not to be reopened was mailed to Elder, and a carbon copy of such notice was mailed to Mrs. Juanita Peterson, mother of Theron Leroy Elder.

On January 24, 1952, SSS Form 252, Notice to Report for Induction, was mailed to Elder, ordering him to report for induction into the armed forces of the United States on February 12, 1952, at Los Angeles, California.

On February 12, 1952, Elder reported for induction but refused to submit to induction into the armed forces of the United States.

V.
Argument.

A. Replying to appellant's Assignment of Error (Spec. of Error 1, App. Br. p. 6), the Government contends that there was no denial of due process of law in treating appellant's request for "a personal appearance before the Appeal Board" as an appeal rather than a request for personal hearing before the local board.

The Selective Service Regulations, Section 1624.1, provides in its pertinent part:

> "1624.1. Opportunity to Appear in Person.—(a) Every registrant, after his classification is determined by the local board . . ., shall have an opportunity to appear in person before the . . . local board . . . if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such 10-day period may not be extended."

This regulation sets out in clear language the requirements necessary to establish a right to a personal appearance before the local board. The requirements are again repeated on the Notice of Classification (SSS Form 110), sent to a registrant following his classification by the local board. (App. Br. pp. 8-9.) These requirements are set forth in clear and precise language and create no ambiguity which might mislead a registrant in the prosecution of any rights granted him under the Selective Service Regulations.

The argument of counsel for the appellant resolves itself merely to the question of interpretation of the request made by the appellant to the local board. This was a request for "a personal appearance before the Appeal Board." In construing this request, the local

board determined it was an appeal, and not a request for a personal appearance before the local board. This particular issue, it is submitted, is squarely within the ruling of *Cox v. United States,* 332 U. S. 442.

Cox v. United States, 332 U. S. 442, provides the limits of judicial review of the actions of administrative boards under the Selective Service Act. These limitations as defined by the *Cox* case (*supra*) confine judicial review to the question of whether or not the action of the local board in classification of a registrant was "arbitrary and capricious." The Court in the *Cox* case says, at page 448:

> "The scope of review to which petitioners are entitled, however, is limited; as we said in Estep v. United States, 327 U. S. 114, 122-3: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classifications made by the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.' "

Further, at page 453, the Court says:

> "When the judge determines that there was a basis in fact to support classification, the issue *need not and should not* be submitted to the jury . . . Upon the judge's determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration." (Emphasis added.)

The local board having determined the request to be an appeal and the finding by the trial court that the action of the local board was neither arbitrary nor capricious [R. p. 38], there was no error in refusing to give appellant's proposed jury instruction No. 13 or in refusing to admit evidence on this point and submit the issue to the jury.

B. Replying to appellant's next Assignment of Error (Spec. of Error 2, App. Br. pp. 6-7), the Government contends that the second part of appellant's Specification of Error is not properly before this Court. The Government further contends that there was no denial of due process of law in refusing to submit to the jury any question concerning the advisory opinion of the Hearing Officer to the Appeal Board.

It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court. (*Becker Steel Co. of America v. Cummings,* 296 U. S. 74; *Ex parte Kamiyama,* 44 F. 2d 503; 4 C. J. S. 430, Sec. 228.)

Insofar as the transcript of record in the present appeal raises no question of the failure of the Hearing Officer to disclose adverse material to the appellant or that the appellant made any such request, this question is not properly before this Court.

Appellant's further assignment of error relates to the failure of the trial court to submit the question of the incompleteness and incorrectness of the report of the Hearing Officer to the jury.

Cox v. United States, 332 U. S. 442, defines the limitations placed upon reviewing courts in their review of the

administrative proceedings before the Selective Service Board. At page 454, the Court says:

> "It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted. As we have said elsewhere the board records were made by petitioners. It was open to them to furnish full information as to their activities. *It is that record* upon which the board acted and upon which the registrant's violation of orders must be predicated." (Emphasis added.)

The trial court in the present case found that there existed basis in fact for the classification of the appellant. [R. pp. 29, 38.] Having made such a finding, the Court properly withheld from the jury any question as to the validity of the classification given the appellant. (*United States v. Fry,* 103 Fed. Supp. 905.) Consequently, refusal by the trial court to give appellant's requested instruction No. 14 and refusal to submit the issue to the jury was proper.

The appellant also assigns as error the failure of the trial court to give appellant's proposed jury instruction No. 10. The Transcript of Record discloses that exception was taken by the appellant only to the failure on the part of the trial court to give appellant's proposed jury instructions Nos. 13 and 14. [R. p. 51.] Rule 30 of the Federal Rules of Criminal Procedure provides in its pertinent part:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, . . ."

No timely objection having been made to the trial court's failure to give appellant's instruction No. 10 pursuant to Rule 30, such question is not properly before this Court for review.

C. Replying to appellant's next Assignment of Error (Spec. of Error 3, App. Br. p. 7), the Government contends that there was no denial of due process of law in the failure of the local board to notify the appellant's mother concerning any classification made of the appellant by the Selective Service Board.

The Selective Service Regulations, Section 1626.2, provides in its pertinent part:

> "1626.2. Appeal by Registrant and Others—(a) . . . any person who claims to be a dependent of the registrant . . . may appeal."

Some question is raised by the appellant as to the interpretation of the letter written by Mrs. Juanita Elder, the appellant's mother, to the local board. [R. pp. 42-43.] Appellant claims the local board should have interpreted this as a request for a dependency deferment. In this regard the definition of "dependent" is important. The Selective Service Regulation, Section 1622.30, provides in its pertinent part:

> "1622.30 Class III-A
>
> (a) . . .
>
> (b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother or sister who is *dependent upon him for support* . . ." (Emphasis added).

No showing of extreme hardship or privation by one who is dependent for support upon the appellant is made in the letter written by Mrs. Elder. This is, as the trial court puts it, a request for appellant's deferment "so he can act as a chauffeur." [R. p. 43.]

Assuming, however, that the letter written by Mrs. Elder could be construed as a request for a dependency deferment, the Government contends that the appellant was not denied due process of law by failure of the local board to notify Mrs. Elder of the classification given the appellant.

It is fundamental that due process of law is afforded a person when he is given notice and an opportunity to be heard. There is no evidence that the failure to send the required notice to Mrs. Elder deprived the appellant of any right or injured him at any stage of his appeal. Appellant was afforded an appeal. At that time he had an opportunity to support any claim of dependency that he might have had. This the appellant failed to do. As stated by the Court in *United States v. Fry,* 103 Fed. Supp. 905, at pages 909-910:

> "The court must look to substance rather than to form. The registrant was not injured in any respect by failure to receive this notice."

Further, the question raised by the appellant again falls within the limitation of *Cox v. United States,* 332 U. S. 442. The local board having construed Mrs. Elder's letter as a mere request for consideration of the matters contained therein, and the trial court having found that such action was neither arbitrary nor capricious

[R. p. 38], such decision of the local board was "final" within the meaning of the *Cox* case, *supra,* and properly withheld from consideration by the jury.

VI.

Conclusion.

The questions raised in this appeal fall within the limitations on judicial review of Selective Service Board action as stated in *Cox v. United States,* 332 U. S. 442. The trial court finding there was no arbitrary or capricious action by the local board, the only questions for submission to the jury were whether the appellant was ordered to induction and whether the appellant refused to submit to induction as ordered. These two questions the trial judge submitted to the jury. All other questions were properly withheld from the consideration of the jury.

There was no error of law in the rulings of the trial court and the conviction should be affirmed.

Respectfully submitted,

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